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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOANNE MARY HOLMES and IAN NOBLE

Appeal 2009-005990
Application 10/603,343
Technology Center 1700

Decided: March 16, 2010

Before EDWARD C. KIMLIN, ADRIENE LEPIANE HANLON, and
CHUNG K. PAK, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision finally rejecting claims 1 through 9, all of the claims pending in the above-identified application. We have jurisdiction under 35 U.S.C. §§ 6 and 134.

STATEMENT OF THE CASE

The subject matter on appeal is directed to “a method for making a fabricated tea product by coating leaf tea with tea solids” (Spec. 1, ll. 5-6). This tea product is said to be produced by mixing the leaf tea with the tea powder “using any art-known method,” preferably in a fluidized bed (Spec. 16-20). Details of the appealed subject matter are recited in representative claim 1 reproduced from the Claims Appendix to the Appeal Brief (“App. Br.”) filed July 7, 2008 as shown below:

1. A method for preparing a fabricated leaf tea product comprising the steps of:

(a) mixing leaf tea with tea solids derived from tea powders to produce a mixture; and

(b) simultaneously wetting and drying the mixture to produce the fabricated leaf tea product,

As evidence of unpatentability of the claimed subject matter, the Examiner relies on the following references at page 3 of the Answer.

(“Ans.”) dated October 1, 2008:

Menzi	6,056,949	May 2, 2000
Carns	EP 0 910 956 A1	Apr. 28, 1999

Appellants request review of the following grounds of rejection set forth at pages 3 through 7 of the Answer¹:

¹ Appellants argue the limitations of claim 1 only even though the Examiner has set forth two grounds of rejection against claims 1 through 4 and 9 and 5 through 8, respectively (App. Br. 7-12). Therefore, for purposes of this appeal, we select claims 1 and 5 to decide the propriety of the Examiner’s § 103(a) rejections set forth in the Answer. See 37 C.F.R. § 41.37(c)(1)(vii) (“When multiple claims subject to the same ground of rejection are argued

1) Claims 1 through 4 and 9 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Carns; and

2) Claims 5 through 8 under 35 U.S.C. § 103(a) as unpatentable over the combined disclosures of Carns and Menzi (App. Br. 6).

Appellants traverse the Examiner's § 103(a) rejections, arguing that Carns does not teach or suggest mixing leaf tea with tea solids and simultaneously wetting and drying the resulting mixture as required by claims 1 through 4 and 9 (App. Br. 7-9). Appellants also contend that Menzi does not remedy the deficiencies in Carns and rely on the same argument advanced in connection with the Examiner's rejection of claims 1 through 4 and 9 to establish patentability of claims 5 through 8 (App. Br. 9-12). The Examiner, on the other hand, finds that Carns teaches or would have suggested mixing leaf tea with tea solids and simultaneously wetting and drying the resulting mixture (Ans. 8-9).

ISSUE AND CONCLUSION

The dispositive question is: Does Carns teach or suggest mixing leaf tea with tea solids and simultaneously wetting and drying the resulting mixture within the meaning of 35 U.S.C. § 103(a)? On this record, we answer this question in the affirmative.

RELEVANT FACTUAL FINDINGS

The following relevant factual findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427

as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone.”).

(Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office):

1. Carns teaches (p.3, para. 0024) that:

If it is desired to have a mixture of tea leaves and soluble tea powder in the tea bag, the soluble tea solids are suitably provided in the form of soluble freeze-or spray-dried tea powder. However, *for better visual appearances, the soluble tea solids are preferably coated on the tea leaves. This may be accomplished by spraying a tea concentrate onto the tea leaves and drying the leaves; either simultaneously or in separate steps. The coating process may be carried out in any suitable coating apparatus; for example a fluidized bed drier, a rotary coater, and the like.* [(Emphasis added.)]

2. Carns teaches that the tea concentrate contains about 40% to about 45% by weight of the soluble tea solids (the remainder being the liquid) (p. 4, para 0030 and p. 5, para. 0040).
3. Appellants also do not dispute the Examiner's finding at page 4 of the Answer that the tea concentrate taught by Carns contains the soluble tea solids and liquid (water). (Compare Ans. 4 with App. Br. 7-9.)
4. Carns, by virtue of not specifying the drying temperature employed, impliedly suggests the employment of optimum or workable drying temperatures, such as those claimed, for drying given tea leaves coated or wetted with a tea concentrate containing tea solids (p. 3, para 0024, p. 4, Example 1 and p. 5, Example 6).
5. Appellants also do not dispute the Examiner's findings and conclusions at pages 6 and 7 of the Answer that:

Fluidized bed driers have been known in the art of drying foods including tea products. Menzi et al., hereinafter Menzi, teaches a process of making granulated flavorings including tea flavors (example 6) where the core material is vegetable matter such as

tea powder. Menzi teaches the use of fluidized bed apparatus for coating the base material with flavors (column 1, line 61) by spraying and drying. The air temperature taught by Menzi for the coating and drying process ranges from about 30-80°C (column 2, lines 49-51), which includes the temperature range recited by the applicant in claims 7 and 8. Thus drying temperatures in the range recited by the applicant have been known to be employed for making combined tea products as taught by Menzi. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Carns and dry the combined tea product using the fluidized bed temperature range as taught by Menzi, in order to make the combined tea product at a suitable temperature without losing the flavor and aroma characteristics of tea product. One would have been further motivated to keep the temperature in the range taught by Menzi to produce a consistent product at an optimal rate....

...it would be a matter of routine determination for one of ordinary skill in the art at the time of the invention to raise the temperature of water or liquid to a desirable range, such as, closer to the air temperature taught by Menzi, i.e., in the range of 30-80°C, such that the temperature of the product in the fluidized bed does not change significantly as a result of spraying of water or a liquid coating material. If colder water were to be used to wet the tea product, it would require more energy and longer processing time to bring the temperature of the wet-tea product at par with the set temperature of the fluidized bed, i.e., 30-80°C, which will increase cost of making the product. The temperature range of 30-80°C, i.e., fluidized bed temperature range, also encompasses the range recited by the applicant in claims 5 and 6. Therefore, it would have been obvious to one with ordinary skill in the art to modify Carns and spray the tea with water or liquid that is heated to the temperature close to the temperature of the fluidized bed (i.e., 30-80°C) in order to facilitate maintenance of temperature of the fluidized bed between 30-80°C (as taught by Menzi).
[[Compare Ans. 6-7 with App. Br. 9-12.]]

PRINCIPLES OF LAW

As stated by Supreme Court of the United States in *KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007):

[A]nalysis [of whether the subject matter of a claim would have been obvious under § 103] need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can *take account of the inferences and creative steps that a person of ordinary skill in the art would employ*. [(Emphasis added.)]

ANALYSIS

As indicated *supra*, Carns, like Appellants, describes a method of making a fabricated tea product by coating tea leaves with tea solids in, for example, a fluidized bed. Specifically, Carns teaches (p.3, para. 0024) that:

[F]or better visual appearances, the soluble tea solids are preferably coated on the tea leaves. This may be accomplished by spraying a tea concentrate onto the tea leaves and drying the leaves; either simultaneously or in separate steps. The coating process may be carried out in any suitable coating apparatus; for example a fluidized bed drier, a rotary coater, and the like. [(Emphasis added.)]

As the tea concentrate containing liquid (water) and tea solids is sprayed on the tea leaves in a fluidized bed, a mixture of the tea solids and the tea leaves is necessarily formed and wetted and is necessarily subject to further wetting and mixing until the spraying of the tea concentrate is terminated. This mixing and wetting step, according to Carns as indicated above, can be done simultaneously or separately with its drying step.

Thus, we concur with the Examiner that Carns teaches or would have suggested mixing tea leaves with tea solids and simultaneously wetting and drying the resulting at least partially wet mixture. As correctly stated by the

Examiner at page 3 of the Answer, the claims on appeal do not preclude forming at least a partially wet mixture of tea leaves and tea solids before being subjected to wetting and drying since they, by virtue of reciting the transitional term “comprising,” do not preclude the presence of liquid in a mixture or in forming a mixture or an additional earlier partial wetting step.² *In re Baxter*, 656 F.2d 679, 686-87 (CCPA 1981) (“As long as one of the monomers in the reaction is [claimed] propylene, any other monomer may be present, because the term ‘comprises’ permits the *inclusion* of other steps, elements, or materials.”).

Accordingly, we affirm the Examiner’s decision rejecting claims 1 through 9 under § 103(a).

ORDER

In view of the foregoing, the decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

² In any event, one of ordinary skill in the art would have reasonably expected to form the same or similar mixture regardless of the sequences involved, i.e., mixing tea leaves with tea solids in dry form and then wetting them or mixing and wetting tea leaves with a liquid containing tea solids. In such a circumstance, it is well established that reordering the steps of a known process, such as the sequence claimed, is not patentable absent proof in the record that the order of performing the steps produces a new and unexpected result. *In re Burhans*, 154 F.2d 690, 692 (CCPA 1946).

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